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REDISCOVERING FRANCIS LIEBER: AN AFTERWORD AND INTRODUCTION

Michael Herz*

I

In our media age, more and more people are famous just for being famous, rather than for any particular achievement, notorious or otherwise. We spend a good deal of time transfixed by "celebrities" known for no obvious qualities other than fame itself. Francis Lieber, once this country's most respected law professor,¹ of whom it was written in 1873 that "his fame will be secure in the lap of history,"² presents the opposite case: he is forgotten despite great accomplishment. At best, one might say he is famous for being forgotten. His name comes up, but almost every modern reference to Lieber points out that few remember who he was.³

Lieber himself may well have feared being forgotten—he perpetually viewed himself as undervalued—but not because that was

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¹ Paul D. Carrington, *Meaning and Professionalism in American Law*, 10 CONST. COMM. 297, 304 (1993) ("Lieber was recognized by his contemporaries, including James Kent and Joseph Story, as perhaps the premier legal academic of antebellum times.").

² M. RUSSELL THAYER, *THE LIFE, CHARACTER, AND WRITINGS OF FRANCIS LIEBER* 50 (1873), reprinted in 1 *THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER* 13 (Daniel C. Gilman ed., 1881).

³ In addition to most of the contributions to the present symposium, see, e.g., James Farr, *The Americanization of Hermeneutics: Francis Lieber's Legal and Political Hermeneutics*, in *LEGAL HERMENEUTICS* 83, 84, 98 (Gregory Leh ed., 1992) (Lieber's work important but "relatively unattended to," Lieber "virtually forgotten"); James Farr, *Hermeneutical Political Science*, in *HISTORY OF SOCIOLOGY* 65, 66 (1986-1987) (Lieber's works "languish unread on library shelves"); M.H. Hoefflich, *Roman and Civil Law in American Legal Education and Research Prior to 1930: A Preliminary Survey*, 1984 U. ILL. L. REV. 719, 722 ("[F]ew Columbia faculty today recall that the second appointment to the faculty of the Columbia Law School in 1857 was Francis Lieber."). Reviewing the Eskridge and Frickey legislation casebook, Judge Richard Posner notes that the book is slim on philosophical material, but does "include an illuminating passage by the neglected German-American hermeneuticist, Francis Lieber." Richard A. Posner, *Book Review*, 74 VA. L. REV. 1567, 1570 n.4 (1988) (reviewing WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (1988)). As if to confirm the neglect, Posner then misstates the title of Lieber's *Legal and Political Hermeneutics*. *Id.*

Julia Ward Howe, who was a friend of Lieber's, confidently predicted that "the works which preserve the essence of his laborious and eventful life must surely grow in interest if the world does not greatly deteriorate in wisdom." Julia W. Howe, *Dr. Francis Lieber*, CRITIC, Dec. 30, 1882, at 351. I leave to the reader whether Lieber's fading away demonstrates that Howe was wrong about his work or right about the world.

what he felt he deserved. "I know," he wrote, "that my work belongs to the list which begins with Aristotle, and in which we find the names of Thomas More, Hobbes, Hugo Grotius, Puffendorf."⁴ While most would deem this assessment a bit of an exaggeration, Lieber deserves better than he has received. The present symposium aims to correct the oversight, for there is a good deal more to say about Lieber than that he has been forgotten.

In this issue the *Cardozo Law Review* republishes Lieber's *Legal and Political Hermeneutics*,⁵ the work of his which offers the best combination of readability, brevity, and interest to the modern audience. The *Review* has also solicited nine commentaries that elaborate on the issues Lieber's works raise, and compiled an extensive bibliography of works by and about Lieber for those wishing to read further.

This Essay serves as an afterword to Lieber's text and an introduction to the articles that follow. Following a brief biographical sketch of Lieber, I will highlight some important themes from Lieber's work and the accompanying essays.

II

Franz Lieber (the Francis came later, in America) was born in 1800 in Berlin.⁶ His family was intensely nationalistic and Francophobic (or, in the words of Lieber's friend Charles Sumner,

⁴ FRANK FREIDEL, FRANCIS LIEBER: NINETEENTH CENTURY LIBERAL 165 (photo. reprint 1968) (1947). Similarly, Lieber once offered the following list of the most prominent political philosophers during the century preceding 1850: Montesquieu, de Tocqueville, and himself. *Id.* at 275; see also BERNARD E. BROWN, AMERICAN CONSERVATIVES: THE POLITICAL THOUGHT OF FRANCIS LIEBER AND JOHN W. BURGESS 16-18 (1951) (quoting Lieber as asserting that he would "not rest until I force the political and legal world to quote me").

⁵ FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS: PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS (William G. Hammond ed., 3d ed., St. Louis, F.H. Thomas & Co. 1880) (1837), republished in 16 CARDOZO L. REV. 1883 (1995). [In subsequent citations, the page number as it appears in the republication will be given in brackets following the page citation to the third edition.]

⁶ Lieber's birthdate is in dispute. The date usually given is 1800. See, e.g., Paul D. Carrington, *The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber*, 42 J. LEGAL EDUC. 339, 358 (1992); 6 DICTIONARY OF AMERICAN BIOGRAPHY 236 (Dumas Malone ed., 1936). Freidel, however, concludes that Lieber was born in 1798. FREIDEL, *supra* note 4, at 3 n.4.

Except as otherwise noted, the following biographical material is drawn from FREIDEL, *supra* note 4. This is the standard and definitive full-length biography. Other biographical material is listed in *A Lieber Bibliography, with Annotations*, 16 CARDOZO L. REV. 2321 (1995). The best short biographical treatment is Carrington, *supra*, at 356-68.

"gallophobic"),⁷ and it was with feverish enthusiasm that in 1814 the teen-aged Lieber volunteered to fight against Napoleon.⁸ He was seriously wounded at Namur, a battle that was part of the Waterloo campaign. After a lengthy recuperation, he returned to his studies in Berlin, becoming a disciple of Friedrich Jahn. In 1819 Jahn and many of his followers were arrested; Lieber was held in prison for four months and upon his release forbidden to study at a Prussian university. He then enrolled at the University of Jena, from which, on the strength of a grand total of four months of study, he received a Doctor of Philosophy degree in 1820. There followed brief periods of study at Halle and Dresden.

In January 1822 Lieber left for Greece as a volunteer in the war of independence with Turkey. This venture did not turn out as planned, and, after a few months, a bitter and wholly disillusioned Lieber made his way to Rome. There he fell in with the historian Berthold Niebuhr, who was then the Prussian Ambassador to the Vatican. He spent a year in Niebuhr's household, working as a tutor to the Ambassador's children, before returning to Germany to begin studies at Halle. He was once again imprisoned, however, this time on the basis of suspicions, apparently unfounded, that he was involved in an assassination plot. Niebuhr's intervention prompted his release, but he was not allowed to renew his studies or to work.

In 1826, Lieber made his way to London as a stowaway. He spent a year in that city, working as a tutor. In keeping with a

⁷ Nys quotes a letter from Sumner to his brother, in which he mentions "the 'gallophobia' which you have observed in our friend Lieber." Ernest Nys, *Francis Lieber—His Life and Work* (pt. 1), 5 AM. J. INT'L L. 84, 87 (1911). In *Hermeneutics* and throughout Lieber's work, England is generally the model of how to go about things; France almost always the example of what not to do. See, e.g., LIEBER, *supra* note 5, at 181 [at 2018]. A rare exception is the following: "Absolutism aided greatly in effecting that general plan of education, which we behold in its vast results, in Prussia; let us take its best fruits, without going through the same political process. France has done so." *Id.* at 221 [at 2044]. This is a rather backhanded compliment—France had the good sense to copy Prussia—but positively generous compared to most of Lieber's work.

⁸ His own account is melodramatic but affecting:

When the day appointed for the enlistment of the volunteers arrived, we went to my father, and said, "Well, then, we go; is it with your consent?" "Go to your mother," he replied. We went to her; our hearts were big; she had suffered so much during the first campaign. With a half-choked voice I said; "Mother, we go to be enrolled, shall we?" She fell into our arms, that noble woman, and sobbed aloud. "Go," was all her bleeding heart allowed her to utter; and had she been the mother of twenty sons, she would have sent them all.

FRANCIS LIEBER, *Personal Reminiscences of the Battle of Waterloo*, in 1 THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER, *supra* note 2, at 149, 152.

lifelong pattern, he was remarkably successful at what we would now call networking. His circle included Jeremy Bentham and John Austin, among other leading intellectual figures.

The following year, Lieber emigrated to America. He spent the next six years in Boston, writing, teaching swimming, and associating with leading academic and political figures. As he had done in London, he managed to fall in with the intellectual elite of Boston.⁹ His major project during these years, and the first of many instances of intellectual entrepreneurship, was the *Encyclopedia Americana*, the first American general knowledge encyclopedia. The first volume appeared in 1828; the thirteenth and last in 1833. Lieber enlisted many of his friends to contribute. Among them was Joseph Story, who wrote all of the many articles on legal topics.

With the encyclopedia complete, Lieber moved to New York City in 1832, and to Philadelphia in 1833. There he devoted a year to producing a plan for Girard College, a school for orphans in Philadelphia founded by a \$5 million bequest from Stephen Girard.¹⁰ Professor Lawrence Cunningham, who is in a position to know, describes Lieber's plan for Girard College as "ingenious."¹¹ As Frank Freidel writes:

Lieber enthusiastically prepared a plan of education in keeping with the spectacular five-million-dollar Girard bequest. He wished it to be the means of "carrying over some of the fruits of long and toilsome experience in Europe . . . and planting them [in] the fresh and rich soil of this new world." Consequently, he liberally interpreted the will to embrace no mere orphan school but a comprehensive polytechnic and teacher-training institution. It would offer a wide range of courses and encompass shops, laboratories, an observatory, and a press. He proposed the discussion technique for teaching some courses, and wished to bar corporal punishment on the upper levels.¹²

⁹ And their guests. In 1831 Lieber met Alexis de Tocqueville during the Frenchman's visit to Boston. The two remained friends and correspondents thereafter. Lieber translated de Tocqueville and de Beaumont's *Le Systeme Penitentiaire* for publication in the United States and was de Tocqueville's American correspondent during the latter's brief stint as a newspaper editor. ANDRE JARDIN, *TOCQUEVILLE: A BIOGRAPHY* 150-51, 391-92 (Lydia Davis & Robert Hemenway trans., Farrar Straus Giroux 1988) (1984).

¹⁰ Lieber uses Girard's will as an illustration in a couple of places in *Hermeneutics*. See LIEBER, *supra* note 5, at 94-95, 100-01 [at 1957, 1960-61].

¹¹ Lawrence A. Cunningham, *Hermeneutics and Contract Default Rules: An Essay on Lieber and Corbin*, 16 CARDOZO L. REV. 2225, 2247 n.95 (1995).

¹² FREIDEL, *supra* note 4, at 106 (quoting letter from Francis Lieber to Nicholas Biddle, Sept. 1, 1833).

In his contribution to the present symposium, Dean Aviam Soifer offers a quick guided tour of Lieber's hugely detailed plan, which he considers pragmatic, nuanced, and enlightened.¹³

Throughout these years, Lieber had unsuccessfully sought an academic appointment. In 1835 he finally obtained a professorship in history and political economy at South Carolina College (now the University of South Carolina). There he remained for more than twenty years, most of them spent trying to leave. Despite his discontent, it was during this time that he produced his most substantial pieces of scholarship. This is not the place for an account of that work; the bibliography gives an indication of its volume and scope. Three books stand out. One is the volume reprinted here, *Legal and Political Hermeneutics*. The second is the book of which *Hermeneutics* was originally to be a part, the *Manual of Political Ethics*,¹⁴ which dealt with the moral (or, to use a more modern synonym, civic) and democratic responsibilities of citizens. Mike Horenstein's article in this issue discusses the *Political Ethics* at length, explicating Lieber's complex moral and political philosophy.¹⁵ The third, and what was Lieber's most successful and long-lasting work of political science/constitutional law, was *On Civil Liberty and Self-Government*,¹⁶ which first appeared in 1853.¹⁷ Each of these works went through multiple editions and was republished posthumously by leading academics late in the nineteenth century. Indeed, a fourth edition of *Civil Liberty* appeared as late as 1901.

Lieber resigned from South Carolina College, after having been denied the presidency of that institution, in December 1856, and moved to New York City. Once in New York he obtained an appointment at Columbia University. The major episode of Lieber's years at Columbia—personally, politically, and professionally—was, not surprisingly, the Civil War. Personally, the war

¹³ Aviam Soifer, *Facts, Things, and the Orphans of Girard College: Francis Lieber, Protopragmatist*, 16 CARDOZO L. REV. 2305 (1995).

¹⁴ FRANCIS LIEBER, *MANUAL OF POLITICAL ETHICS* (Boston, Charles C. Little & James Brown 1838-1839). This work is illuminatingly discussed in Carrington, *supra* note 6, at 368-90.

¹⁵ Mike R. Horenstein, *The Virtues of Interpretation in a Jural Society*, 16 CARDOZO L. REV. 2273 (1995).

¹⁶ FRANCIS LIEBER, *ON CIVIL LIBERTY AND SELF-GOVERNMENT* (Philadelphia, Lippincott, Grambo 1853). For a full discussion, see BROWN, *supra* 4; FREIDEL, *supra* note 4, at 266-74.

¹⁷ *Civil Liberty* appeared in a second edition in 1859. After Lieber's death, Theodore Woolsey prepared a third edition, which appeared in 1874. A fourth edition was published in 1901.

was significant because Lieber's three sons all fought in it. Hamilton, who lost an arm, and Norman fought for the North; their older brother, Oscar (sometimes said to have been Lieber's favorite) for the South. Oscar was fatally wounded at Williamsburg, where Norman fought for the Union, and died ranting against his father.

The war also saw Lieber's most direct involvement in political affairs. His antislavery sentiments, largely suppressed, at least in public, during his years in the South, were now given free rein in public speeches and through a series of antislavery pamphlets written for the Loyal Publication Society,¹⁸ where he was first chair of the publication committee and then President. Though Lieber was not always a satisfying or successful stylist in his adopted tongue,¹⁹ some of his antislavery writing is quite powerful.²⁰

The Civil War also prompted what has proved to be Lieber's most enduring legal contribution. In 1863, he drafted General Orders No. 100, setting out in 157 numbered paragraphs rules of conduct for the Union armies in the field. Often referred to as the Lieber Code or Lieber's Instructions, this was the first codification of the laws of warfare.²¹ It was this hugely influential work²² that prompted Secretary of State Elihu Root to say: "If our Society [the

¹⁸ The Society's mission is reflected in the following resolution, adopted at its inaugural meeting on February 14, 1863:

Resolved, That the object of this organization is, and shall be confined to, the distribution of Journals and Documents of unquestionable and unconditional loyalty throughout the United States, and particularly in the Armies now engaged in the suppression of the Rebellion, and to counteract, as far as possible, the efforts now being made by the enemies of the Government and the advocates of a disgraceful peace to circulate journals and documents of a disloyal character.

FRANCIS LIEBER, NO PARTY NOW, BUT ALL FOR OUR COUNTRY (1863) (inside front cover).

¹⁹ For an example of how excruciating his writing could sometimes be, see LIEBER, *supra* note 5, at 78 [at 1945] (sentence beginning "Yet to fix"). Fortunately sentences such as this are the exception.

²⁰ See, e.g., FRANCIS LIEBER, *Amendments to the Constitution, Submitted to the Consideration of the American People*, in 1 THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER, *supra* note 2, at 137, 169-72.

²¹ For an overview, see Richard S. Hartigan, *Introduction to LIEBER'S CODE AND THE LAW OF WAR 1* (Richard S. Hartigan ed., 1983). The year before, Lieber had written *Guerilla Parties Considered with Regard to the Laws and Usages of War*. This was part of the same overall project. Lieber's Code is generally acclaimed as humane and progressive. See, e.g., James F. Childress, *Francis Lieber's Interpretation of the Laws of War: General Orders No. 100 in the Context of His Life and Thought*, 21 AM. J. JURIS. 34, 70 (1976) (characterizing General Orders No. 100 as "a monument and a signpost and, moreover, an inspiration to constant reflection on morality and law in war"); George D. Haimbaugh, Jr., *Humanitarian Law: The Lincoln-Lieber Connection*, 13 GA. J. INT'L & COMP. L. 245 (1982). For a dissenting view, however, see Chris af Jochnick & Roger Norman, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 65-66

American Society of International Law], at once national and international, were about to choose a patron saint, and the roll were to be called, my voice for one would answer, 'Francis Lieber.' ²³

Following the war, Lieber was appointed by the War Department to catalogue and preserve the Confederate archives. He also served as an umpire on the Mexican Claims Commission. Lieber was transferred to the Columbia Law School in 1865, where he and Theodore Dwight constituted the entire faculty, and remained at Columbia until his death in 1872.

III

Why should we bother to read Lieber's *Hermeneutics* more than a century and a half after its first publication? Echoing Thomas Jefferson's well-known admonition about idealizing the framers,²⁴ Lieber himself warns against being overpreoccupied with older authorities:

We have in this particular to guard ourselves against an inordinate veneration of old authors, merely because they are old, or against a too implicit reliance upon old authors, simply because they have been relied upon so long. Science advances, and it would be a matter of great regret if successive centuries were unable to supersede by their labors some works of previous pe-

(1994) (objecting that the Code, in common with other statements of the law of war, undercuts its apparent protections with an overbroad "military necessity" exception).

²² Lieber's Code was adopted by the Prussian Army in 1870 and was the basis of late nineteenth-century international efforts to codify the law of war. It directly underlies the Hague Conventions of 1899 and 1907, and elements of it can still be seen in the Geneva Convention. See generally Hartigan, *supra* note 21, at 22-23; Telford Taylor, *Foreword to THE LAW OF WAR: A DOCUMENTARY HISTORY* at xviii (Leon Friedman ed., 1972) (labeling Lieber Code the "germinal document for codification of the laws of land warfare").

²³ Elihu Root, *Francis Lieber*, 7 AM. J. INT'L L. 453, 466 (1913), reprinted in ELIHU ROOT, *ADDRESSES ON INTERNATIONAL SUBJECTS* 89 (1916); see also Root, *supra*, at 459:

[W]e cannot fail to set a high estimate upon the service of the man who gave form and direction and effectiveness to the civilizing movement by which man at his best, through the concurrence of nations, imposes the restraint of rules of right conduct, upon man at his worst, in the extreme exercise of force.

²⁴ Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and to this they would say themselves, were they to rise from the dead.

Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in *THE PORTABLE THOMAS JEFFERSON* 552, 558-59 (Merrill D. Peterson ed., 1975).

riods, though they have justly enjoyed, and for a long time, the reputation of authority.²⁵

Several of the authors in the present symposium have successfully guarded themselves against the inordinate veneration of Francis Lieber, and the purpose of reprinting *Hermeneutics* is not to encourage a "too implicit reliance upon" it. Lieber will not single-handedly guide us out of the contemporary interpretive thicket. To the extent he is right, many of his insights have become received wisdom and/or taken over by others.²⁶ And he is not always right: he oversimplifies, his assumptions can be unsatisfying, he barely hints at the relativism that even the least postmodern contemporary reader assumes. On the other hand, the contributors to this symposium find much of value in Lieber's work and several—notably Binder, Horenstein, Soifer, and Cunningham—argue that Lieber has important, neglected, and directly applicable insights that modern lawyers and philosophers should not ignore. The reader can judge Lieber's value for him or herself. Let me suggest a few reasons, however, why his work in general and *Hermeneutics* in particular merit close attention.

In part, Lieber is important because in so many ways he came first. "Lieber was the first . . . American law teacher to write a work on law and economics. He was the first American law teacher to do survey research. He was the first American encyclopedist. He was arguably the first American legal comparativist."²⁷ To this accounting might be added Lieber's interest and writing on education,²⁸ criminal punishment,²⁹ and property³⁰—all of which

²⁵ LIEBER, *supra* note 5, at 91-92 [at 1954-55]; see also *id.* at 186-88 [at 2021-23]. "We are, indeed, as to experience, the old ones, and the past generations the young ones" *Id.* at 187 [at 2022].

²⁶ Carrington, *supra* note 6, at 348 ("Lieber's works do not merit reading as a source of insights unavailable in more accessible contemporary work.").

²⁷ *Id.* at 357 (footnotes omitted).

²⁸ Lieber had relatively little formal education—not for want of trying—and was a consistently unpopular classroom teacher. Nonetheless, he was deeply committed to the practical and spiritual value of education and had strong views on how it should be conducted. These included the autodidact's conviction that formal education is incomplete. In addition to the *Plan for Girard College*, perhaps the most interesting, and most modern, of his writings is an 1835 pamphlet entitled *Remarks on the Relation Between Education and Crime*. Backed up by statistics, here Lieber argued that comprehensive public education was a critical weapon in the war against crime, as we would say today. See FREIDEL, *supra* note 4, at 104. Several relevant essays appear in the *Miscellaneous Writings: On the Study of Foreign Languages*, 1 THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER, *supra* note 2, at 281; *On The Necessity of Continued Self-Education*, 1 THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER, *supra* note 2, at 281 (1851 commencement address at South Carolina College); *The Ancient and the Modern Teacher of Politics*, 1 THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER, *supra* note 2, at 329 (inaugural address at Columbia); and

were strikingly original for their time.³¹ As for *Hermeneutics*, it not only introduced the term "hermeneutics,"³² it broke "new ground as the first substantial American work on legislation and on the doctrine of precedent. It can fairly be said to be the first American book applying techniques of literary criticism to legal institutions."³³

More important than coming first, of course, is not also being last. Lieber's work, though not often cited, was influential. Francis Mootz asserts that, "[t]he nineteenth-century hermeneutical tradition in Continental philosophy has had an enduring effect on American legal theory and practice through Lieber's scholarship."³⁴ This may be an overstatement. While Lieber's work has surely infiltrated into modern legal culture, it has received little direct attention in this century. It is therefore hard to quantify his importance in American intellectual and legal history. Yet this too is one reason why Lieber merits a closer look. As Mike Horenstein aptly puts it, "Lieber's thought . . . remains somewhere in the light

Religious Instruction in Colleges, 2 THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER, *supra* note 2, at 525.

²⁹ In addition to Lieber's translation of de Beaumont and de Tocqueville, see *On Penal Law*, published as a pamphlet in 1838 and reprinted in 1 THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER, *supra* note 2, at 469 (endorsing solitary confinement and philosophizing about the nature of just and effective punishments). Solitary confinement was a particular hobby horse of Lieber's.

³⁰ See FRANCIS LIEBER, *ESSAYS ON PROPERTY AND LABOUR* (1841). It is this work to which Carrington refers in describing Lieber as the first American law professor to write a work of law and economics.

³¹ A complete bibliography of Lieber's writings appears in *A Lieber Bibliography, with Annotations*, *supra* note 6, at 2321. I note only in passing that among his firsts, Lieber ran what was apparently the first swimming school in the United States. See Hoeflich, *supra* note 3, at 729.

³² Sanford Levinson & Steven Mailloux, *Preface* to *INTERPRETING LAW AND LITERATURE* at ix (Sanford Levinson & Steven Mailloux eds., 1988). Lieber was aware that his readership would not be familiar with the term, and carefully laid out its meaning and etymology. LIEBER, *supra* note 5, at 52 [at 1927].

³³ Carrington, *supra* note 6, at 362; see also Hoeflich, *supra* note 3, at 729 (describing *Hermeneutics* as the first American attempt to devise a set of canons of legal interpretation); Roberta Kvelson, *Semiotics and Methods of Legal Inquiry: Interpretation and Discovery in Law from the Perspective of Pierce's Speculative Rhetoric*, 61 IND. L.J. 355, 356 (1986) (Lieber's *Hermeneutics* was "the first major expression of a semiotic approach to legal discovery and interpretation").

³⁴ Francis J. Mootz III, *The New Legal Hermeneutics*, 47 VAND. L. REV. 115, 116-17 (1994); see also Thomas G. Barnes, *Introduction* to FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* 4 (Thomas G. Barnes ed., 1994) (2d ed. 1839) (introduction separately published) ("[T]his classic made a lasting contribution to American legal literature and learning at a critical juncture in the development of our juristic tradition.").

and shadow of American law, in need of both retrieval and rearticulation."³⁵

Many of the particulars of Lieber's thought remain relevant to our own efforts to grapple with law and governance in a constitutional democracy. For example, Paul Carrington has written elsewhere that Lieber's thoughts "resonate" with the contemporary revival of civic Republicanism, and also overlap with "related thoughts about democratic education and political ethics that can be found in the work of such contemporary authors as Amy Gutmann and Dennis Thompson."³⁶ The idea to which Lieber was most attached, lurking in *Hermeneutics* and dominating his other work, is captured in a favorite phrase: "No right without its duty, no duty without its right."³⁷ This principle is as topical now as a century and a half ago.³⁸

Such links to modern debates are numerous in *Hermeneutics*. Needless to say, Lieber's general topic is, and always will be, relevant in any age. But there are more specific connections as well. Lieber offers a set of interpretive canons, many of which overlap with those that are still common in judicial opinions. Debate over both the particulars and the general approach remains very much with us. Although the canons are consistently ridiculed³⁹ and occasionally eulogized, reports of their death have always proven to

³⁵ Horenstein, *supra* note 15, at 2279.

³⁶ Carrington, *supra* note 6, at 348 (footnotes omitted).

³⁷ Lieber was sufficiently taken with this idea that he apparently had it engraved on his stationery. THAYER, *supra* note 2, at 45; Childress, *supra* note 21, at 48 n.44. He described this principle as "perhaps the only thing I shall have contributed to jurisprudence when I die." Letter from Francis Lieber to S.A. Allibone (Feb. 15, 1870), *quoted in id.* at 48 n.44.

³⁸ Lieber's slogan sounds more Hohfeldian than it is. Whereas Hohfeld's jural correlatives of right and duty exist in two separate persons, or in one person and in the state, Lieber's is a quasimoral principle that views right and duty as both residing in each individual. He writes in *Political Ethics*:

The very condition of right is obligation; the only reasonableness of obligations consists in rights. Since, therefore, a greater degree of civil liberty implies the enjoyment of more extended acknowledged rights, man's obligations increase with man's liberty. Let us, then, call that freedom of action which is determined and limited by the acknowledgement of obligation, Liberty; freedom of action without limitation by obligation, Licentiousness. The greater the liberty, the more the duty. For, the less bound or circumscribed we are in our actions from without, the more indispensable it becomes that we bind ourselves from within, that is, by reason and conscience.

³⁹ LIEBER, *supra* note 14, at 384.

³⁹ The classic instance being, of course, Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950) (detailing the "thrust and parry" of counteracting canons).

have been exaggerated.⁴⁰ The courts are as wed to canons, at least in writing opinions, whether or not in deciding cases, as ever. And while many commentators have launched massive assaults on canonical approaches, Lieber was only the first of many to endorse such an approach, reaching to the present day most prominently in the work of Cass Sunstein.⁴¹ In his contribution to this volume, Prof. William Eskridge, Jr. points out Lieber's "prescience" with regard to contemporary theoretical battles over statutory interpretation.⁴² Bruce Ackerman's description of the moment of constitution-making as a period of "heightened mobilization"⁴³ was prefigured by Lieber's view that if there is a justification for privileging "framers' intent" it is not that the framers knew more, but that their circumstances "were more exciting to virtue."⁴⁴ The

⁴⁰ See, e.g., Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1180 ("[I]n the years following Llewellyn's work, it was conceivable that the outdated reliance on maxims would soon give way to a more enlightened approach to statutory interpretation. That optimism did not prove warranted.").

⁴¹ See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 147-92 (1993). For a collection of recent academic discussion of interpretive canons, see Symposium, *A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 529 (1992). The contributors to the present issue do not focus on the canonical nature of Lieber's proposals per se. The usual attacks on such an approach focus on problems of internal contradiction, indeterminacy, and democratic illegitimacy. To the extent they are valid, these criticisms apply to Lieber's principles of interpretation and construction as fully as to other systems of canons. In places, criticizing Lieber on these grounds is like shooting fish in a barrel. For example, he states that because "public welfare is the supremest law of every country," the obligation to further the public welfare applies to all interpretation. Lieber notes that people too often (1) assume that the public welfare amounts only to economic prosperity and (2) confuse their own interests with the public welfare. LIEBER, *supra* note 5, at 172-73 [at 2012-13]. It is very hard to take the public welfare constraint seriously as a neutral principle limiting interpretation. To the contrary, it looks more like the opening for extravagant construction and personal whim. Such a concern is compounded when we are told that the general welfare does not consist of what people "frequently" think it does, but something else; viz., what Francis Lieber thinks it does.

All that said, in general I think Lieber offers his canons in a useful, realistic, and reasonably flexible way. As Paul Carrington has written, he would not have been surprised by the Llewellyn critique. Carrington, *supra* note 1, at 306.

⁴² See William N. Eskridge, Jr., "Fetch Some Soupmeat," 16 CARDOZO L. REV. 2209, 2222 (1995).

⁴³ Bruce Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1013, 1023, 1049 (1984).

⁴⁴ It frequently happens, that a fundamental law of a country is adopted at a period when universal enthusiasm renders purity of action more common than is the case in easy times, when self-devotion is little called for and selfishness diffuses itself in all classes. Thus it was a great epoch when the American colonies declared themselves free, and there can be no doubt that there was more self-devotion in that congress at Philadelphia than in our easy times will be found in an equally large number of men. Those times were more exciting to virtue, and if we speak of the patriotic signers, there is truth in the expression "wisdom of our fathers." Not that they were better organized beings, for the favorite saying of Lord Nelson, that there are as good fish left in the sea as have

list could be continued. The point is that Lieber's issues were our issues, even in the particulars, and reconsidering his insights while critically evaluating his blind spots should help us to "supersede by [our] labors some works of previous periods."⁴⁵

Hermeneutics speaks to today's readers not only because its subject is relevant. In certain ways Lieber displays a distinctly modern cast of mind as well. I would point to two particular aspects of Lieber's approach that help ensure his continued relevance. Most obviously, he prefigures a central tenet of modern literary theory: "the ubiquity of interpretation in the process of reading every text—even where it seems to us as readers that no active interpretation is taking place at all."⁴⁶ As Wolfgang Holdheim explains in his contribution to the present volume, Lieber (following Friedrich Schleiermacher) was at the then-cutting edge of a "Copernican revolution" in understanding that finally recognized that interpretation is unavoidable, that no text interprets itself.⁴⁷

The second aspect of Lieber's analysis with a contemporary feel that I would highlight concerns categorization. For the modern reader, much of what is tedious about nineteenth-century legal writing is the endless categorizing: scholarship as taxonomy. Listing categories seems a poor substitute for understanding them, and the whole enterprise is undermined by our suspicion that the categories do not reflect any ultimate, natural truth but are only a constructed and artificial system. As Larry Lessig points out, Lieber undeniably had the nineteenth-century (and, one might add, Germanic) tendency toward categorization.⁴⁸ But Lieber also was aware that his categories constantly threatened to collapse, that differences were ones of degree more than kind, and that other categorizations were possible. For example, he recognizes that the central distinction of his whole work, the difference between inter-

come out of it, is very true, but the combination of circumstances was more favorable.

LIEBER, *supra* note 5, at 187-88 [at 2022]; see also *id.* at 219-22 [at 2043-45].

⁴⁵ *Id.* at 91 [at 1955] (originally quoted in text at *supra* note 25).

⁴⁶ Levinson & Mailloux, *supra* note 32, at x.

⁴⁷ See Wolfgang Holdheim, *A Hermeneutic Thinker*, 16 CARDOZO L. REV. 2153, 2156 (1995); see also William G. Hammond, *Appendix to LEGAL AND POLITICAL HERMENEUTICS*, *supra* note 5, at 245-46 [at 2063] (Note C: On the Province of Legal Hermeneutics).

⁴⁸ See Lawrence Lessig, *The Limits of Lieber*, 16 CARDOZO L. REV. 2249, 2254 (1995). This surfaces in many places in *Hermeneutics*, for example in the lengthy breakdown of the different types of interpretation and construction, LIEBER, *supra* note 5, at 54-70 [at 1928-39], and in the categorization of different types of constitutions, *id.* at 167-68 [at 2009-10].

pretation and construction, will not always hold in practice, however clear it is in theory:

It lies likewise in the nature of things that, in many cases, interpretation and construction must closely approach to one another; but the distinction is clear. Food and poison are very distinct things, although in some cases they approach so closely that it would be difficult to decide, with absolute certainty, which term we ought to choose.⁴⁹

At the outset he distinguishes interpretation from conjecture, only immediately to concede that "[s]till it lies in the nature of things, that, in some cases, they approach to each other."⁵⁰ Likewise "objects of the physical world are not so distinctly defined from each other as they appear to be at first glance. Innumerable transitions exist between them."⁵¹ And, in a sentence added for the third edition: "Even sensations are not absolutely divided by a line of demarcation; the highest delight borders on pain."⁵² While rejecting "literal interpretation" and insisting on recognizing "tropes as tropes," he also acknowledges that "it is very difficult to say where the literal signification of a word ends, and the figurative begins."⁵³ Moreover, while words have a core of clear meaning, they become more uncertain "the farther we remove from that centre, somewhat like certain territories of civilized people bordering on wild regions."⁵⁴ For this reader, at least, Lieber's recognition—even his frustration, perhaps—that his categories are so unstable redeems much of what might otherwise be wooden and artificial.⁵⁵

Finally, Lieber's mind was sufficiently lively that one comes across nuggets of insight or arresting phrases in even his dreariest and least interesting passages. For example, in my view the last two chapters of *Hermeneutics* are the least successful of the book. The discussion of precedents is noncommittal and unsophisticated (this may be where Lieber's lack of legal training was most incapacitating). Indeed, it is one place where the editor outshines the

⁴⁹ LIEBER, *supra* note 5, at 53 [at 1927-28].

⁵⁰ *Id.* at 9 [at 1898-99].

⁵¹ *Id.* at 22 [at 1907].

⁵² *Id.* at 23 [at 1907-08].

⁵³ *Id.* at 54-55 [at 1928-29].

⁵⁴ *Id.* at 15 [at 1902]. As Eskridge points out, Lieber here exactly prefigures H.L.A. Hart's distinction between the core and the penumbra. See Eskridge, *supra* note 42, at 2213.

⁵⁵ Avi Soifer points to a related aspect of Lieber's thinking: his relative comfort with paradox. Soifer, *supra* note 13, at 2310. In particular, Soifer writes, "Lieber sought to struggle towards what he repeatedly claimed to be unreachable." *Id.* Categorization may be one of those unreachable things. Certainly, Lieber's acceptance of paradox brings him closer to a modern audience than many of his contemporaries.

author.⁵⁶ Yet even here there is the occasional striking proposition or turn of phrase: for example, the aphoristic observation that "the more the advocates of a political measure feel themselves obliged to rely on precedents, the less they ought to be trusted,"⁵⁷ or the objection, in keeping with his keenly dynamic sense of law and history, that an "idolatri of precedents . . . at times has slaughtered Justice at her own altars."⁵⁸

In commenting on the greater value of more recent authors, Lieber notes the advantage that "they relate to cases applying to the same circumstances and conditions with our own; they speak the same language with ourselves."⁵⁹ Lieber is decidedly not a recent author, and circumstances and conditions have changed vastly since his day. To a surprising extent, however, he does "speak the same language with ourselves."

IV

Most people are at least surprised, if not astonished, to learn that in 1837 someone wrote a book called *Legal and Political Hermeneutics*. "Hermeneutics" seems so (post)modern, so trendy, that it is a bit like learning that Robert Fulton, in addition to developing the steamboat, was also doing important work with personal computers. Law professors usually see "the very word 'hermeneutics' [as] a refugee from the English departments of the 1970s" that has only recently become "one of the darlings of current scholarly fashion."⁶⁰ My comments in the previous section notwithstanding, the book itself is in fact less ahead of its time than its title suggests. Had it been called "Rules of Statutory and Constitutional Interpretation," as it could have been, it would sound a good deal less esoteric and intriguing to the modern ear.⁶¹ In this section, I will

⁵⁶ See LIEBER, *supra* note 5, at 312-30 [at 2093-2105] (Hammond comments).

⁵⁷ *Id.* at 203 [at 2033].

⁵⁸ *Id.* at 208-09 [at 2036].

⁵⁹ *Id.* at 226 [at 2047].

⁶⁰ Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065, 1068 (1993) (reporting results of Westlaw search that showed 37 law review uses of the word from 1982-1984 and 297 from 1990-1992).

⁶¹ Lieber's odd title dismayed at least some of his readers. Chancellor Kent's son, William, objected: "What, in God's name, made you choose '*Hermeneutics*'? Had you called your . . . book '*principles of Interpretation*,' . . . many an honest fellow, now frightened away, would have read & enjoyed the writings." FREIDEL, *supra* note 4, at 175 (quoting a Dec. 19, 1843 letter from William Kent to Francis Lieber). On the title pages of his later works, Lieber was consistently identified as, among other things, the author of "*Principles of Legal and Political Interpretation*"—a work which does not exist. See, e.g., CIVIL LIBERTY, *supra* note 16, at title page (1853, 2d ed. 1859, 3d ed. 1877); MANUAL OF POLITICAL ETHICS, *supra* note 14, at title page; 1 & 2 THE MISCELLANEOUS WRITINGS, *supra* note 2,

briefly describe the interpretive program that lies behind Lieber's fancy title, and summarize the discussions of Lieber's views that are provided by the other contributors to this volume.

A

Lieber is today best remembered for his codification of the laws of war. While this project was in some ways a sidelight (one of many) to his primary work in political science and constitutional law, it is, in a way, altogether fitting that Lieber be so identified with the law of war. For it is the most extreme (or, perhaps, naive and optimistic) example of his deep commitment to, and belief in, the rule of law. For Lieber it was a mark of civilized society that it subject the acts of soldiers during wartime—what seems the most lawless of circumstances—to a set of written rules of conduct.

A preoccupation with the rule of law, or, as he usually phrased it, "the supremacy of law,"⁶² dominates all of Lieber's work. From many possible instances, let me offer just one other slightly curious illustration, written right at the outset of his American career. In a collection of sketches about travels in the United States, Lieber gave three reasons why political defeat does not make people insane in this country.⁶³ One is that the frequency of elections allows a wait-til-next-year attitude that prevents profound discouragement, another that "no dishonor whatever" attaches to political defeat. But the third, and, one senses, most important reason, is that "the people know very well that their lives and property are not in jeopardy, that whatever party may come in or go out, the broad principle of the whole system will be acted upon, the general laws will be observed."⁶⁴ Warming to his subject, he goes on to assert that the idea that "liberty exists only where the majority can do what they please"⁶⁵ is a "monstrous idea".⁶⁶

[O]n the contrary, the degree of existing liberty can justly be measured only by the degree of undoubted protection which the minority enjoy, and the degree in which the sovereign, be he one

at title pages. One cannot but wonder whether this paraphrase of the actual title and subtitle reflected editorial discomfort with the "h" word.

⁶² See, e.g., LIEBER, *supra* note 5, at 40, 128 [at 1919, 1983].

⁶³ In contrast to France, of course, where the asylums were apparently crammed with the losers of political contests.

⁶⁴ 2 FRANCIS LIEBER, *THE STRANGER IN AMERICA: COMPRISING SKETCHES OF THE MANNERS, SOCIETY, AND NATIONAL PECULIARITIES OF THE UNITED STATES, IN A SERIES OF LETTERS TO A FRIEND IN EUROPE* 25 (London, Bentley 1835).

⁶⁵ *Id.* at 26.

⁶⁶ *Id.* at 25; cf. *supra* note 37 (quoting Lieber's distinction between liberty and licentiousness).

or many, or represented by the majority, is restricted, by fundamental laws, from acting on sudden impulses and impassioned caprices.⁶⁷

Hermeneutics cannot be understood, I think, except in light of this preoccupation with the rule of law. Lieber rejects either of two approaches to government. First, he insists that government be limited by law. Simply to abandon law in favor of discretion or common sense is to invite tyranny. Such a scheme is appropriate for running the family because the head has the best interests of the other family members at heart; but as an approach for running a country it spells disaster for personal and civil liberties.⁶⁸ Second, Lieber understands that in a government of laws, not men, the laws will not speak for themselves. As his aphoristic first sentence indicates, and as he reiterates time and again, interpretation is always necessary. Yet false interpretations of one sort or another had

⁶⁷ LIEBER, *supra* note 64, at 26.

⁶⁸ The debate is of course still very much with us. As I was preparing this essay, Cass Sunstein reviewed Philip Howard's *The Death of Common Sense* in the *New York Times*. Howard argues that America is now choking on law. He would trade in the modern version of the rule of law for a regime based on common sense and cooperation. See PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994). Sunstein reminds us, however, that

[o]nce freed from rules, public officials and private citizens may exercise their discretion invidiously. They may be confused, biased or corrupt. Without rules, it may be very hard to monitor whether people are doing what they should do. And without fair process, officials may make damaging mistakes. . . . In some contexts rules and rights are indispensable; the alternatives would be much worse.

Cass R. Sunstein, *Land of 4,000 Unreadable Rules*, N.Y. TIMES, Feb. 12, 1995, § 7 (Book Review), at 12. Sunstein does not cite Lieber, but he easily could have.

On the other hand, one of Howard's central contentions is pure Lieber. Echoing, in his title and elsewhere, Lieber's repeated invocations of common sense, Howard launches a particular attack on overdetailed rules. The result of too much detail is that "[m]odern law is unknowable." HOWARD, *supra*, at 30. The misguided "quest for protection through certainty" leads only to "arbitrary power." *Id.* at 32. "Loopholes only exist because of precise rules. The Constitution, a short document of general principles, has no loopholes." *Id.* at 43. It is Lieber who offers the classic argument as to the futility of "attempting to speak with absolute clearness and endless specifications." LIEBER, *supra* note 5, at 19 [at 1905]. This is the point of the famous soupmeat hypothetical. See *id.* at 18 [at 1904-05]; see also *id.* at 150-51 [1997-98] (noting superiority of general over detailed instructions to soldiers and diplomats); Eskridge, *supra* note 42 (discussing soupmeat hypothetical). Indeed, Howard and Lieber agree that efforts to constrain power and discretion through detail have, perversely, the opposite effect. See LIEBER, *supra* note 5, at 22 [at 1907] ("The more we strive in a document to go beyond plain clearness and perspicuity, the more we do increase, in fact, the chances of sinister interpretation."). Lieber himself had to grapple with a detailed set of instructions in preparing the plan for Girard College. One wonders whether he learned from that experience, consciously or not, the futility of highly detailed prescriptions. See Soifer, *supra* note 13, at 2309-14 (discussing broad latitude Lieber took in interpreting Girard's will).

been the tool of tyranny.⁶⁹ Therefore, if law is to be a bulwark against tyranny, interpretive approaches cannot be up for grabs. The goal of *Hermeneutics* was to outline an interpretive approach that would, if honestly applied, ensure the rule of law. Lieber was not a literary critic, he was a political scientist with an intense concern about good government and the avoidance of tyranny. For this hater of Napoleon, wounded at Waterloo and imprisoned in Prussia for his political beliefs, the concern over government abuses was much more than theoretical. His *Hermeneutics*—which was originally designed as part of a *Manual*—was practical, not theoretical, and it was aimed toward the achievement of sound government.

Paul Carrington sees both Lieber's work and its 1880 republication as responses to particular, though opposite, politico-legal currents of the times. Carrington shows that Lieber and William Hammond, editor of the 1880 edition, were pursuing quite different goals.⁷⁰ At the time of its original publication, the work was a response to the then-prevailing view that judges were merely politicians in robes and the resulting Jacksonian efforts to curb judicial independence. Lieber's central premise is that judges "have moral duties to subordinate their personal preferences and determine textual meanings disinterestedly" and "a unifying aim of *Hermeneutics* is to make it matter as little as possible whether a judge is personally of one persuasion or another."⁷¹ By 1880, the tide had turned; Langdellianism, conceiving law as an autonomous and technocratic discipline, was ascendant. In this setting, the 1880 edition (like the new editions of much of Lieber's other work around the same time) was a response from the opposite side of the law-as-creation versus law-as-discovery divide than the original publication. Now Lieber was offered as a bulwark against law's "political

⁶⁹ LIEBER, *supra* note 5, at 38 [at 1918] (stressing indispensability of law and lawyers to avoid the abuses that would flow if justice was subjective and hinged on the unconstrained discretion of the judge or sovereign); *id.* at 53 [at 1928] (construction is "dangerous" but indispensable); *id.* at 76-77 [at 1944] (decrying inconsistent or double interpretations as a common tool of tyrannical governments); *id.* at 102 [at 1962] (mocking those who would allow authorities to rely on their intuitions and sense of the public weal rather than faithfully interpreting the Constitution); *id.* at 124 [at 1979] (bad faith interpretation has too often been resorted to to rob people of their property); *id.* at 190-91 [at 2024] (emphasizing value of precedent as an indicator of true law and as a bulwark against governmental "encroachment in the name of law").

⁷⁰ Paul D. Carrington, *William Gardiner Hammond and the Lieber Revival*, 16 CARDOZO L. REV. 2135 (1995).

⁷¹ *Id.* at 2139.

sterilization by the likes of professional technocrats such as Langdell."⁷²

B

What, then, does Lieber propose? His starting point is that interpretation is always necessary. Because direct communication between minds is impossible, we must rely on intermediaries, on signs. For a long catalogue of reasons, the use of signs will inescapably create confusion and uncertainty. The task of interpretation is to eliminate this confusion. For Lieber, it is essential to the proper functioning of government, the avoidance of tyranny, and the participation of the citizen in public life to agree on a set of principles by which the inevitable interpretive tasks will be successfully performed.

Two of our commentators place this project within the larger hermeneutic tradition. Professor Wolfgang Holdheim explains that Lieber's conception was part of a fundamental shift in that hermeneutic tradition, which was in turn part of the larger "Copernican revolution" in the history of ideas.⁷³ The shift was from a focus on the external world to the world of the mind, and within hermeneutics from a belief that interpretation is "artless"—that understanding is automatic and meaning self-evident—to a recognition that interpretation is always and everywhere necessary. As Holdheim explains, key to this shift, both generally and particularly for Francis Lieber, was Lieber's teacher, Friedrich Schleiermacher. Examining the particulars of Lieber's scheme, Holdheim guides us through Lieber's hermeneutics and situates him in a line that begins with Schleiermacher and leads to Martin Heidegger and Hans-Georg Gadamer.

Guyora Binder also identifies Schleiermacher as a critical influence on Lieber and provides a thorough summary of Schleiermacher's thought.⁷⁴ In Binder's view, however, Lieber was equally influenced by Whig legal thought of the early nineteenth century, particular as articulated by Joseph Story, who was Lieber's friend and a substantial contributor to the *Encyclopedia Americana*. In *Hermeneutics*, Lieber "bred Schleiermacher's romantic

⁷² *Id.* at 2152.

⁷³ Holdheim, *supra* note 47, at 2156.

⁷⁴ Guyora Binder, *Institutions and Linguistic Conventions: The Pragmatism of Lieber's Legal Hermeneutics*, 16 CARDOZO L. REV. 2169 (1995).

philology with the Whig's institutional positivism, to spawn an account of law as the hermeneutic perpetuation of institutions."⁷⁵

C

Lieber begins with a modern premise—the inescapability of interpretation—but seeks to downplay the more radical implications of the premise, constructing a hermeneutics that will calm concerns that the failure of texts to speak directly might result in meaning depending on the interpreter rather than the text. In particular, a text can have only one meaning, and that meaning was put there by the author and is, by definition, what the author intended. Lieber recognizes the external influences on interpretation; his goal, though, is to provide the rules by which they are controlled and the text's "one true meaning" perceived and agreed upon by all. Depending on your view, Lieber's "one true meaning" idea supplements, counterbalances, undercuts, or obliterates the initial premise.

Georgia Warnke would take the last of these views.⁷⁶ She rejects Lieber's scheme as simply too antiquated and naive to be of much value today. She contrasts Lieber's insistence on "one true meaning" and his argument that "predestined [i.e., prejudiced] interpretation" is illegitimate with Gadamer's view that meaning is always multiple and that *all* interpretation is oriented by prejudices or assumptions interpreters inescapably bring to the task of understanding. In other words, Lieber's project—to develop a set of principles that will ensure "neutral" and "accurate" interpretation, by whomever applied—is doomed from the outset. Working instead with a Gadamerian conception, Professor Warnke illustrates the opposite approach by rearticulating the controversy over abortion as a hermeneutic conversation. By acknowledging the inescapability of multiple meanings of the key norms and concepts in this debate ("liberty," "life," "autonomy," "responsibility," etc.), she argues, we might understand and learn from others' positions rather than close-mindedly, and fruitlessly, arguing for our own.

William Eskridge, though somewhat more taken with Lieber than is Warnke, agrees with her assessment of his limitations. The failure to fully account for the fact that all meaning is situational, and that different readers will therefore inevitably construct differ-

⁷⁵ *Id.* at 2184.

⁷⁶ Georgia Warnke, *The One True Sense*, 16 CARDOZO L. REV. 2191 (1995).

ent meanings from the same text, hugely reduces the value of Lieber's scheme.⁷⁷

Some other contributors see Lieber as more subtle and sophisticated. Thus, Professor Holdheim, while agreeing with Warnke that a "one true meaning" approach to texts is in general wholly inadequate, rehabilitates Lieber by "interpreting" him to be offering an instrumentally useful fiction. In the legal setting, texts should be treated *as if* they have one true meaning.⁷⁸ Guyora Binder offers an account of Lieber as a pragmatist whose nod to one-true-meaning intentionalism makes more palatable what is in fact an endorsement of significant judicial discretion.⁷⁹ And Mike Horenstein contends that even if "the present discourse on legal interpretation [is] richer, more sophisticated and varied," recovering Lieber remains a necessity despite his apparent limitations.⁸⁰

D

At the heart of Lieber's scheme is his distinction between interpretation and construction. Understanding a text begins with interpretation: "the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey, and of enabling others to derive from them the same idea which the author intended to convey."⁸¹ The overall goal of all of Lieber's interpretive principles is to avoid manipulative and disingenuous—in a word, willful—interpretations. Valid interpretations require good faith (a requirement insisted upon time and again in *Hermeneutics*), common sense, a disdain for literal readings, respect for authorial intention, sensitivity to context and purpose, and a preference for what is "probable, fair, and customary" over "the improbable, unfair and unusual."⁸²

Where interpretation does not "suffice," however, "we must have recourse to construction."⁸³ "Construction is the drawing of

⁷⁷ Eskridge, *supra* note 42, at 2222-24.

⁷⁸ Holdheim, *supra* note 47, at 2162-63.

⁷⁹ Binder, *supra* note 74, at 2185-89.

⁸⁰ Horenstein, *supra* note 15, at 2273-74. I should mention here an article that does not even cite Lieber, but which is directly relevant to the question of whether his hermeneutics can withstand twentieth-century reconceptions. Francis Mootz has attempted to reformulate the traditional view of the rule of law—Lieber's view—in light of Gadamerian hermeneutics. Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249 (1993). Mootz's analysis might also be applied to salvage Lieber from the Gadamerian critique.

⁸¹ LIEBER, *supra* note 5, at 11 [at 1900].

⁸² *Id.* at 109 [at 1967].

⁸³ *Id.* at 50 [at 1926].

conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text.”⁸⁴ Most often, construction is necessary where unanticipated situations have arisen or background circumstances have changed. Interpretation is either impossible because the text simply does not address the problem at hand or (what is perhaps the same thing) interpretation is wrongheaded because to take the text at face value would produce a result wholly at odds with the author’s goal.⁸⁵ The essence of construction is parallelism—what we would call, but Lieber is careful to distinguish from, reasoning by analogy.⁸⁶

Lieber sees the interpretation and construction as sequential, though related. In general, what goes for interpretation also goes for construction; above all, both require good faith, common sense, and a sensitivity to the purpose and the causes of the law. In addition, Lieber lays down a number of specific principles of construction, many wholly familiar to readers of modern judicial opinions: the text cannot be understood to demand the impossible; privileges are to be construed in favor of the non-privileged party; the older a text, the more extensive should be its construction; the weak enjoy the benefit of the doubt; a compact is construed closely and ambiguities resolved against the drafter.⁸⁷

Among Lieber’s changes for the third edition of *Hermeneutics* was the claim that the “distinction is now . . . very generally accepted.”⁸⁸ Even his editor felt obliged to disagree with that optimistic assessment,⁸⁹ however, and at present it can be reported that

⁸⁴ *Id.* at 44 [at 1921]; see also *id.* at 46 [at 1923] (“construction signifies the discovery of the spirit, principles and rules that ought to guide us according to the text”).

⁸⁵ “[T]here are considerations which ought to induce us to abandon interpretation, or in other words to sacrifice the direct meaning of a text to considerations still weightier; especially not to slaughter justice, the sovereign object of laws, for the law itself, [which is only] the means of obtaining it.” *Id.* at 103 [at 1962].

⁸⁶ Construction also has a second aspect which is really quite separate: reading a text so as to comply with “principles or rules of superior authority.” Thus, a statute must be “construed” to be consistent with the Constitution, an administrative act construed to be consistent with the underlying statute, and so on. The two aspects of construction are linked in Lieber’s mind in that they both involve “subjects that lie beyond the direct expression of the text.” *Id.* at 47 [at 1923]. But in the one setting those subjects are derived, however, loosely, from the text, in the other they are imposed on it.

⁸⁷ Lieber’s 16 rules of construction are summarized at *id.* at 136-37 [at 1987-88].

⁸⁸ *Id.* at 50 n.* [at 1925 n.9].

⁸⁹ *Id.* at 50 n.5 [at 1926 n.9]. On the other hand, an admirer wrote in 1873 that the distinction “has been generally adopted by legal writers.” See THAYER, *supra* note 2, at 25, reprinted in 1 THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER, *supra* note 2, at 13.

the construction versus interpretation distinction has almost wholly failed to survive as a matter of vocabulary. In isolated areas of private law courts and commentators use something like this formulation.⁹⁰ And half anyway of Lieber's vocabulary is used by constitutional scholars, for whom "interpretivism" refers (somewhat counterintuitively, but more or less consistently with Lieber's usage) to approaches to the Constitution that are relatively text-bound and originalist. Still, for the most part the two words are deemed perfect synonyms. Judges and commentators seem happy to be equipped with two identical terms, since it allows them to switch from one to the other simply to avoid redundancy.⁹¹

While Lieber's vocabulary is not widely adopted, the ideas it reflects are real: there *are* two separate types of interpretation—or, more accurately, a continuum of interpretive approaches.

All of the articles in this issue explore the distinction between interpretation and construction to some degree. Four focus on it in particular, addressing interpretation and construction in the common law, statutory, and constitutional settings.⁹²

⁹⁰ For example, black letter principles of conflicts of law distinguish between the interpretation of a will and its construction. "Interpretation" is deemed an essentially factual inquiry into the testator's intent. EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* 809 (2d ed. 1992). In contrast, the "process of completing or presuming the intention of the testator as to matters over which he could have exercised testamentary direction, is called construction." *Id.* at 810; *see also id.* at 818. It is said that conflicts rules only come into play with regard to questions of construction and not of interpretation, though at least to this outsider it does not seem necessary to pinpoint the dividing line, which will take care of itself as soon as the court grapples with particular legal rules. *See* Symeon C. Symeonides, *Exploring the "Dismal Swamp,"* 47 LA. L. REV. 1029, 1073-74 (1987).

⁹¹ *See, e.g.,* Thomas Jefferson Univ. v. Shalala, 114 S. Ct. 2381, 2384 (1994) ("the Secretary's *interpretation* is a reasonable *construction* of the regulatory language") (emphasis added); City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588, 1593, 1594 n.5 (1994) ("Petitioners contend that our *interpretation* of § 3001(i)"; "petitioners' contention that our *construction* renders § 3001(i)"; "In view of our *construction* of § 3001(i), we need not consider whether an agency *interpretation*") (emphasis added); Good Samaritan Hosp. v. Shalala, 113 S. Ct. 2151, 2161 (1993) ("where the agency's *interpretation* of [its regulation] is at least as plausible as competing ones, there is little, if any, reason not to defer to its *construction*") (emphasis added); Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842, 844, 865 (1985) (referring interchangeably to EPA's "interpretation" and EPA's "construction" of the Clean Air Act).

⁹² Missing from this list is the administrative setting. While agency interpretation is a type of statutory interpretation, it does not necessarily raise the same issues as statutory interpretation in the courts. Indeed, one might use Lieber's distinction to describe the division of labor between courts and agencies established in *Chevron*, 467 U.S. at 837. In *Chevron* the Supreme Court set out a two-step process for courts to apply in reviewing agency interpretations of statutes. Lieber's interpretation corresponds to *Chevron*'s step one: "First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . ." *Id.* at 842. The premise here is pure Lieber: Congress had an intent, the statute has one true

Professor Lawrence Cunningham explores the difference between Lieber's understanding of the distinction and Corbin's somewhat different understanding. Whereas for Lieber construction still grew out of the text being construed, for Corbin it was external to it—the imposition of a legal norm separate from the agreement or intentions of the parties. Corbin's dichotomy corresponds more accurately to "what judges actually do in contracts cases," but Lieber's view, Cunningham suggests, "offered remarkably prescient prescriptions for" how to do it.⁹³ Specifically, Cunningham brings Lieber's *Hermeneutics* fully into the late twentieth century by investigating how it can help resolve the most provocative debate in contemporary contracts scholarship: the struggle over default rules. Cunningham reconfigures the default rules debate using Lieber's distinctions between different types of construction.

William Eskridge focuses on the part of *Legal and Political Hermeneutics* that is most familiar to the modern legal academy: the soupmeat hypothetical. Lieber shows how an apparently simple instruction from housekeeper to domestic—"fetch some soupmeat"—is only understood because of a raft of unspoken conditions and implicit provisos. Lieber's particular point is that it is at best unnecessary, perhaps misleading, and in any event impossible to be comprehensive. Developing the hypothetical far more than Lieber himself had, Eskridge uses it to explicate how Lieber's principles of interpretation and construction operate in a specific

meaning, and through interpretation (which is not the same as a literal reading or the self-evident unfolding of the statute by itself and may require more than simply reading the statute and seeing what it says) the court comes to understand Congress's meaning. A court moves to *Chevron's* "step two," upholding any reasonable or permissible agency reading, if "the statute is silent or ambiguous with respect to the specific issue," *id.* at 843, that is, if Congress has not "directly addressed the precise question at issue," *id.* at 843 n.9 (emphasis added). In these circumstances, Congress has not resolved the issue and the Court will simply accept any reasonable agency determination. Or, as Lieber puts it: "Interpretation, seeking but for the true sense, forsakes us when the text is no longer directly applicable; because the utterer, not foreseeing this case, did not mean it, therefore, it has no true sense in this particular case." LIEBER, *supra* note 5, at 111 [at 1969] (emphasis in original). Construction involves subjects "beyond the direct expression of the text." *Id.* at 44 [at 1921] (emphasis added). Compare *Chevron*, 467 U.S. at 865 (noting possible causes of statutory ambiguity) with LIEBER, *supra* note 5, at 27, 53-54 [at 1910-11, 1927-28] (giving similar list).

Professors Davis and Pierce describe *Chevron* in just these terms, though I would not assume that they have Lieber in mind. 1 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.3, at 112 (1994) (stating that when a court or agency resolves a policy dispute under a vague statute, it "is not engaged in statutory interpretation. It is engaged in statutory construction.").

⁹³ Cunningham, *supra* note 11, at 2234.

setting.⁹⁴ In doing so, he links Lieber's principles with contemporary debates over statutory interpretation, noting Lieber's "prescience" in anticipating, and providing some lessons for, textualism, the legal process school, intentionalism, and evolutive interpretation. (I discuss in the next section Eskridge's ultimate reservations about Lieber's interpretive guidelines).

Eskridge's discussion helps us understand why Lieber's distinction between interpretation and construction matters so much. More is at issue here than a *descriptive* taxonomical pedantry. The point of the distinction is a *prescriptive* insistence on the legitimacy of a relatively creative and far-reaching approach to texts. Guyora Binder puts this most forcefully, arguing that Lieber's "reduction of intent to language was merely a stratagem to justify an active interpreter."⁹⁵ Certainly there is no disputing Lieber's aversion to narrow, blindly textual interpretation. Acknowledging that "[w]e have first to settle whether construction is at all admissible," Lieber finds the answer clear—indeed, construction is "absolutely indispensable."⁹⁶ In construction is salvation: "It is . . . construction alone which saves us . . . from sacrificing the spirit of a text or the object, to the letter of the text, or to the means by which that object was to be obtained . . . [and through construction that we avoid producing] the very opposite of what it was purposed to effect."⁹⁷

Binder's view of the liberality of Lieber's approach is borne out by Avi Soifer's discussion of the plan for Girard College. Here is the best example we have of Lieber himself actually faced with the sort of interpretative challenges that are the subject of *Hermeneutics*. Girard had been quite specific with regard to the details of the new school, its educational program, and the composition of its student body. His two most famous and troubling restrictions were first that the students be only white male orphans, and second that no "ecclesiastic, missionary, or minister of any sect whatsoever" even be allowed on the premises. Soifer shows that Lieber read both restrictions quite liberally. Indeed, Lieber's whole approach

⁹⁴ Eskridge, *supra* note 42. Eskridge also discusses the soupmeat hypothetical in his recent book on statutory interpretation. See WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 40, 53, 56-57, 125-28, 246-47 (1994).

⁹⁵ Binder, *supra* note 74, at 2185. Binder infers a second, related normative lesson. He links the interpretation/construction distinction to the rules/standards distinction, and stresses Lieber's dismissal of the possibility of comprehensive legislative specificity. He then reasons backwards from Lieber's endorsement of construction by judges to an endorsement of legislation that is construed rather than interpreted, that is, standards rather than rules.

⁹⁶ LIEBER, *supra* note 5, at 50 [at 1926].

⁹⁷ *Id.* at 45 [at 1922].

in drawing up the plan was to emphasize Girard's *implicit* instructions and the spirit of the bequest rather than the explicit language of the will.⁹⁸

Larry Lessig picks up the normative aspect of Lieber's distinction in the context of constitutional interpretation. Drawing on and elaborating on an earlier article,⁹⁹ Lessig analogizes construction to translation and insists, following Lieber, that such a free approach to the Constitution is not only "admissible" but "absolutely indispensable"¹⁰⁰—indeed, that properly understood it is not "free." Yet Lessig ultimately concludes that while Lieber is right to move beyond mere "interpretation" of the Constitution (or, in the parlance of constitutional theory, beyond "interpretivism"), his version of construction cannot provide adequate or satisfying constitutional readings either. Lessig attributes this failure to the fact that Lieber does not take account of the institutional constraints that operate upon the Supreme Court. It is to Lieber's silence as to institutional concerns that I now turn.

E

Many of the pieces in this symposium highlight, directly and indirectly, one issue in particular. That issue is Lieber's understanding, or lack thereof, of institutions and their interactions.

Lieber largely ignores the question of whether some persons or institutions might be better equipped than others to perform the different interpretive tasks. This is surprising. While displaying nothing like postmodern relativism, as Professor Warnke emphasizes,¹⁰¹ Lieber nonetheless took it as a given that different interests and perspective would produce different readings. As Paul Carrington points out, "a premise" of *Hermeneutics* is that "what thoughtful people think and say about law and its interpretation depends heavily on when and where they are."¹⁰² For example, Lieber rejects a plain words approach to texts precisely because the different interests of different readers will prevent consensus: "there are two parties in questions of justice, and . . . what seems so uncommonly plain to the one that no possible doubt can exist, according to his opinion, does by no means present itself in the same

⁹⁸ See Soifer, *supra* note 13, at 2309-14.

⁹⁹ Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

¹⁰⁰ LIEBER, *supra* note 5, at 50 [at 1926].

¹⁰¹ See Warnke, *supra* note 76, at 2191-92.

¹⁰² Carrington, *supra* note 70, at 2151.

light to the other."¹⁰³ Similarly, in his discussion of what he terms "predestined interpretation," he laments that "the interpreter, either consciously or *unknown to himself*, yet laboring under a strong bias of mind, makes the text subservient to his preconceived views, or some object he desires to arrive at."¹⁰⁴

Lieber also insists that different kinds of texts require different interpretive approaches. He devotes chapter VI to those differences. In addition, he stresses the need to consider the particular context in which the text arose.¹⁰⁵ At the heart of his hermeneutics is the insistence that meaning varies with context.¹⁰⁶ All of his rules for interpretation and construction turn on understanding the context (linguistic and social) of the text to be interpreted.

Finally, as a political scientist, one who essentially bought into the framers' model of separated governmental powers, he thought and wrote about the interactions of different branches of government, about the nature of democratic governance, about the role of the judiciary. Mike Horenstein's article touches on some of this material in Lieber's *Political Ethics*.¹⁰⁷ Institutional concerns are even more prominent in *On Civil Liberty*, which might almost be said to be *about* institutions.¹⁰⁸ Indeed, during his life time he was celebrated as someone especially sensitive to the complexities of institutional interactions.¹⁰⁹

In short, Lieber is keenly aware of the contingency of meaning, the need for interpretation, the influence of setting, perspec-

¹⁰³ LIEBER, *supra* note 5, at 39-40 [at 1919] (emphasis added).

¹⁰⁴ *Id.* at 60 [at 1933].

¹⁰⁵ Indeed, perhaps one way of stating the difference between Lieber and, say, Gadamer, is that while Gadamer insists that *understanding* is always "understanding as," see Warnke, *supra* note 76, at 2193, Lieber insists that *meaning* (i.e., authorial intent) is always "meaning as."

¹⁰⁶ See, e.g., LIEBER, *supra* note 5, at 11-12, 107 [at 1900, 1965].

¹⁰⁷ See Horenstein, *supra* note 14, at 2300-02.

¹⁰⁸ Freidel's analysis of *On Civil Liberty* focuses on Lieber's emphasis on the interplay of governmental and private institutions as the essential check on tyrannical absolutism. See FREIDEL, *supra* note 4, at 270-74.

¹⁰⁹ Consider the following encomium:

Those who wish to see the progress which has been made in political science since the Greek phase of European history, need but read Aristotle's *Politics* and Lieber's *Civil Liberty*. For with all the ability of Aristotle, and none can rate it higher than we do, the simple political arrangements of mere city governments depicted in his work seem trifling enough in comparison with the complex schemes of security and administration sketched by Lieber as the great polities of modern times.

Samuel Tyler, *De Tocqueville and Lieber as Writers of Political Science*, PRINCETON REV., 1858, at 23-24. Tyler particularly emphasizes Lieber's emphasis on the need for institutional arrangements, such as "the complex articulated government of the United States," *id.* at 22, to preserve liberty and the rule of law.

tive, and interest on interpretation, and the complexity of intragovernmental relations. All of the premises for a discussion of institutional capacity are present. Yet in *Hermeneutics* that discussion never really occurs. To be sure, *Hermeneutics*, like his other work, makes repeated salutes to the independent judiciary.¹¹⁰ This is a particular application of two fundamental precepts: a belief in the rule of law and an insistence that interpretation be conducted in good faith. An independent judiciary is the best means for protecting the rule of law and (by) guaranteeing good faith interpretation. But beyond this one, rather obvious, concern, a consideration of relative institutional capacities is quite far from the heart of Lieber's work.¹¹¹

In the present volume, Professors Eskridge and Lessig focus in particular on this perceived failing. With regard to statutory interpretation, Eskridge concludes that Lieber cannot resolve today's interpretational challenges. For that task, he insists, we must be more sensitive than was Lieber to strategic behavior, the unavoidable influences of perspective, and institutional incentives.¹¹² Lessig, whose concern is with constitutional interpretation, contends that Lieber never understands that simply ensuring a formally "independent" judiciary will not free the Supreme Court from a host of institutional limitations and influences. In particular, the Court operates within and is constrained by a legal culture that will disable it from carrying out the ideal interpretive program.¹¹³

These criticisms, if valid, go to the heart of Lieber's project, for the absence of institutional considerations in *Hermeneutics* cannot be ascribed to oversight or incompleteness; it grows from the very nature of his proposals. Lieber is confident that the influence of setting, perspective, and interest can be controlled. Indeed, what defines correct and legitimate interpretation is the setting aside of personal leanings, drawing meaning from the text rather than putting meaning into it.¹¹⁴ The premise is that general adoption of sound rules of interpretation can avert tyranny and ensure

¹¹⁰ See, e.g., LIEBER, *supra* note 5, at 36-37, 171, 178-80, 193, 227 [at 1917, 2012-13, 2016-17, 2025-26, 2047-48].

¹¹¹ Lieber's emphasis on the independence of the judiciary helps us not at all, for example, in evaluating the appropriate roles of agency and judiciary under *Chevron*. See *supra* note 92. *Chevron* (or any theory of deference to agency interpretations) rests on an understanding of the differences between interpreters, whereas Lieber was aiming for a scheme in which the identity of the interpreter would not matter.

¹¹² Eskridge, *supra* note 42, at 2223-24.

¹¹³ Lessig, *supra* note 48, at 2265-67.

¹¹⁴ See, e.g., LIEBER, *supra* note 5, at 76, 118-19, 137 [at 1944, 1975, 1988].

the rule of law.¹¹⁵ Assuming good faith, it should not matter who is interpreting: because a text has one true meaning, because the task of interpretation is to discern it, and because his principles will constrain and guide the interpreter, just who is interpreting matters less than that they approach the task correctly. It is perhaps a sign of the depth of his conviction, or of his optimism, that he seems not to care about to whom the interpretive task is assigned, as long as they follow his rules. Of the contributors to the present volume, Mike Horenstein comes closest to sharing that optimism; Georgia Warnke is most distant.

Finally, Guyora Binder would redeem Lieber by arguing that not only does he not ignore institutional considerations, he is in fact centrally concerned with them. Binder states that Lieber understood that "meaning inheres in language's use by communities of language users, especially institutions."¹¹⁶ Thus, for Binder, Lieber's entire account of the process of interpretation rests on the complex interplay of institutions that our other authors criticize him for ignoring.

VI

The works in the present symposium exhibit different degrees of enthusiasm for Lieber on the merits. Whether criticisms or endorsements, however, they contribute immensely to our understanding of Lieber's strengths and weaknesses. Moreover, by using Lieber as the springboard for reflection,¹¹⁷ they help us think through the basic quandaries of interpretation, still and always unsolved.

The many who pause to notice Lieber and comment that he has been forgotten and neglected¹¹⁸ also tend to comment that he deserves better.¹¹⁹ With the present symposium, he receives it.

¹¹⁵ Viewed in this light, Lieber's much-criticized insistence on "the one true meaning" is best explained as Wolfgang Holdheim explains it: as prescriptive rather than descriptive—an instrumentally essential fiction. See Holdheim, *supra* note 47, at 2162-63.

¹¹⁶ Binder, *supra* note 74, at 2185.

¹¹⁷ A loaded term. See Horenstein, *supra* note 14, at 2287 (noting Lieber's view that what separates humans from other animals is not the capacity for thought but the capacity for reflection).

¹¹⁸ See *supra* note 3 and accompanying text.

¹¹⁹ See, e.g., Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 875 n.10 (1986) (noting that although Robert Cover "dusted off" *Hermeneutics*, that "artifact unfortunately has been generally forgotten again").